

CALIFORNIA COASTAL COMMISSION

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TH-15a

Staff: CLD-SF
Staff Report: October 16, 2003
Hearing Date: November 6, 2003

RECOMMENDED FINDINGS FOR CEASE AND DESIST ORDER

CEASE AND DESIST ORDER: CCC-03-CD-07

RELATED VIOLATION FILE: V-4-03-014

PROPERTY LOCATION: Vacant lot adjacent to 42500 Pacific Coast Highway, Malibu, Ventura County, APN 0700-80-0305.

PROPERTY DESCRIPTION: Vacant lot located on the south side of Pacific Coast Highway between a 42500 Pacific Coast Highway and the north bank of Little Sycamore Canyon Creek in an area referred to as County Line Beach. The southeastern portion of the site has also been designated a cultural resource site based on the discovery of Native American remains and artifacts near the mouth of Little Sycamore Canyon Creek.

PROPERTY OWNERS: Elizabeth Harrington

VIOLATION DESCRIPTION: (1) Construction of a railroad tie seawall/planter with a concrete footing extending approximately 100-feet along the toe of the coastal bluff and into the mouth of Little Sycamore Canyon Creek without a coastal development permit, (2) Construction of a 6-foot high staggered double retaining wall on the upper section of the bank of Little Sycamore Canyon Creek, (3) Installation of a chain link fence with shade fabric that blocks public views from the highway to the ocean, and (4)

Landscaping, including the use of some non-native invasive species that blocks public views of the ocean from the highway.

SUBSTANTIVE FILE DOCUMENTS: Executive Director Cease and Desist Order No. ED-03-CD-01, Exhibits A through M.

CEQA STATUS: Exempt (CEQA Guidelines (GC) §§ 15060(c) (2) and (3)) and Categorically Exempt (CG §§ 15061(b)(2), 15307, 15308 and 15321).

I. SUMMARY

Commission staff recommends that the Commission issue the proposed Cease and Desist Order (CDO) to Elizabeth Harrington, owner of the subject property, and her husband William F. Lynch (hereinafter referred to as "Respondents") to resolve their Coastal Act violations. The subject property is an undeveloped beachfront lot located southeast of 42500 Pacific Coastal Highway. The Coastal Act violations consist of development in the coastal zone without a coastal development permit (CDP) in violation of Section 30600(a) of the Coastal Act.

A portion of the unpermitted development lies within the Commission's retained jurisdiction and other portions lie within the jurisdiction of Ventura County's certified local coastal plan (LCP). The unpermitted development within the Commission's retained jurisdiction is a seawall/planter constructed of railroad ties with a concrete footing extending approximately 100-feet along the toe of the coastal bluff and into the mouth of Little Sycamore Canyon Creek, which drains onto the beach at the southeastern end of the property. (See photographs in EXHIBIT A) The unpermitted development within the LCP jurisdiction consists of a 6-foot high staggered double retaining wall on the upper section of the bank of Little Sycamore Canyon Creek, a chain link fence with visually impermeable shade fabric along Pacific Coast Highway, and landscaping including the use of some non-native and invasive species that block public views of the ocean from the highway. (See photographs in EXHIBIT B)

Commission staff discovered the unpermitted development on March 11, 2003. Upon meeting with Mr. Lynch, Commission staff directed Respondents to halt construction of the seawall/planter because it was development that required a CDP. Respondents initially complied but then recommenced construction on March 12, 2003. Despite repeated verbal warnings from Commission staff issued during site visits on March 11, 14 and 17, 2003 and by telephone on March 17, 2003 Respondents continued work because they asserted the project had received approval of the County Building and Safety Division. On March 14, 2003, Commission staff hand delivered to Respondents a Notice of Intent (NOI) to issue an Executive Director cease and desist order (EDCDO) (EXHIBIT C) to

order them to stop work pursuant to his authority under California Public Resources Code (PRC) Section 30809. When Respondents continued working despite the issuance of the NOI, the Executive Director issued EDCDO No. CCC-03-ED-01 on March 19, 2003. (EXHIBIT D)

The southeastern portion of the site was identified as an important archaeological site in 1952 and was called the Sand Dune Site. In 1966 it was designated as Cultural Resource Site VEN-86 after a prehistoric Native American shell midden and artifacts were discovered at the site. In 1971 researchers excavated a prehistoric Native American burial and a large mortar at the site. (EXHIBIT E)

Coastal resource impacts from the unpermitted development consist of damage to an environmentally sensitive habitat area (ESHA) and the water quality in Little Sycamore Canyon Creek caused by the railroad tie seawall/planter and retaining wall, grading and berming of sand on the beach, and blockage of public views of the ocean from Pacific Coast Highway. The seawall/planter has the potential to negatively impact the public beach in the intertidal zone by accelerating erosion and scour of the beach in front of the seawall and at either end of the seawall, interrupting longshore processes, altering the configuration of the shoreline by fixing the seaward extent of the coastal bluff, and blocking the sand supply to the beach from the coastal bluff.

The Commission staff recommends the Commission issue this CDO pursuant to authority in Section 30810 to require Respondents to: (1) cease and desist from maintaining unpermitted development on their property in violation of the Coastal Act, (2) refrain from conducting any further development on their property without a CDP, and (3) remove the unpermitted development and carry out such work under the terms and conditions of the CDO as necessary to ensure compliance with the Coastal Act, pursuant to the authority of Section 30811.

II. HEARING PROCEDURES

The procedures for a hearing on a proposed CDO are outlined in Section 13185 of the California Code of Regulations (CCR), Title 14, Division 5.5, Chapter 5, Subchapter 8. The CDO hearing procedure is similar in most respects to the procedures the Commission utilizes for permit and LCP matters.

For a CDO hearing, the Chair shall announce the matter and request that all parties or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, at his or her discretion, to ask of any other party. Staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those

areas where an actual controversy exists. The Chair may then recognize other interested persons after which staff typically responds to the testimony and to any new evidence introduced.

The Commission will receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in CCR Section 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the proposed CDO, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of a motion, per staff recommendation or as amended by the Commission, will result in issuance of the proposed CDO.

III. MOTIONS

MOTION 1: I move that the Commission issue Cease and Desist Order No. CCC-03-CD-07.

Staff Recommendation of Approval:

Commission staff recommends a **YES** vote. Passage of the motion results in adoption of the following resolution and findings and the issuance of the Cease and Desist Order No. CCC-03-CD-07. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to issue Cease and Desist Order:

The Commission hereby issues Cease and Desist Order No. CCC-03-CD-07 set forth below and adopts the proposed findings set forth below on the grounds that Respondents have conducted development without a coastal development permit and in so doing have violated the Coastal Act.

IV. PROPOSED FINDINGS

A. Coastal Act Violation

Respondents have conducted development in the coastal zone without a CDP in violation of Coastal Act Section 30600(a).

Section 30600(a) provides:

(a) Except as provides in subdivision (e), and in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone, other than a [public] facility subject to Section 25500, shall obtain a coastal development permit.

“Development” is defined in Coastal Act Section 30106 as:

...on land, in or under water, the placement or erection of any solid material or structure;... grading, removing, dredging, mining, or extraction of any materials;...[and] construction, reconstruction, demolition, or alteration of the size of any structure.

The unpermitted development consists of:

- (1) Construction of a railroad tie seawall/planter with a concrete footing that extends approximately 100-feet along the toe of the coastal bluff and into the mouth of Little Sycamore Canyon Creek.
- (2) Construction of a 6-foot high staggered double retaining wall on the upper section of the bank of Little Sycamore Canyon Creek and backfill behind the retaining wall.
- (3) Installation of a chain link fence with visually impermeable shade fabric along Pacific Coast Highway that blocks public views of the ocean from Pacific Coast Highway.
- (4) Landscaping, including the use of some non-native and invasive species that block public views of the ocean from Pacific Coast Highway.

The seawall/planter is located on the beach within the Commission’s retained jurisdiction, while the remainder of the unpermitted development lies within the jurisdiction of Ventura County local coastal plan (LCP).

In a letter to Ventura County Planning Department dated April 14, 2003, Commission staff noted the unpermitted development in the LCP jurisdiction and asked whether the County was going to take enforcement action. (EXHIBIT F) In a response dated April 16, 2003, Ventura County confirmed the existence of the violations and informed the Executive Director that it lacks the capacity to enforce the LCP violations. (EXHIBIT G) Pursuant to Coastal Act Section 30810(a)(2), a CDO may be issued by the Commission to enforce any requirements of the LCP if “(2) The Commission requests and the local government or port governing body declines to act, or does not take action in a timely manner, regarding an alleged violation which could cause significant damage to coastal resources.”

B. Basis for Issuance of the Cease and Desist Order

(1) Coastal Act Authority

The Commission is authorized to issue a CDO pursuant to Section 30810 of the Coastal Act. Section 30810 provides:

(a) If the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit... the commission may issue an order directing that person or governmental agency to cease and desist. The order may also be issued to enforce any requirement of a certified local coastal program [if] (2) The commission requests and the local government or port governing body declines to act, or does not take action in a timely manner, regarding the alleged violation which could cause significant damage to coastal resources.

Subsection (b) of Section 30810 also provides:

(a) The cease and desist order may be subject to such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to this division.

(2) Consistency with Chapter 3 Policies of the Coastal Act

In addition to being unpermitted under the Coastal Act, the development does not meet the requirements for approval in Section 30235 and is inconsistent with Sections 30240, 30231 and 30251 of the Coastal Act,¹ as discussed below.

Seawall/planter

Section 30235 provides:

...seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline supply.

¹ These findings are provided for contextual purposes, but it should be noted that inclusion of these findings is not a requirement for issuance of a cease and desist order pursuant to authority in §30810 of the Coastal Act.

Approval of the seawall/planter is not required under Section 30235 because it neither serves a coastal dependent use, nor protects existing structures or public beaches in danger from erosion, and it was not designed to eliminate or mitigate adverse impacts on local shoreline sand supply.

Section 30253 provides:

New development shall:

- (1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*
- (2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*

The seawall is not consistent with Section 30253 because it may negatively impact the public beach in the intertidal zone by accelerating erosion and scour of the beach in front of the seawall and at either end of the seawall, interrupting longshore processes, altering the configuration of the shoreline by fixing the seaward extent of the coastal bluff, and blocking the sand supply to the beach from the coastal bluff.

Section 30231 provides:

The biological productivity and the quality of coastal waters, streams, wetlands estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

The railroad ties used to construct the seawall/planter and the retaining wall are impregnated with creosote and may impact the water quality of Little Sycamore Canyon Creek, which flows across the beach and into the ocean.

Retaining wall on upper section of creek bank

The 6-foot high staggered double retaining wall on the upper section of the bank of Little Sycamore Canyon Creek is not consistent with the ESHA policies of the Ventura County LCP. Under Section C of the Environmentally Sensitive Habitats section of the Ventura County South Coast Area Plan, creek corridors, including Little Sycamore Canyon Creek, are protected as ESHA. Policy 2 of Section C provides:

2. *All projects on land either in a stream or creek corridor or within 100-feet of such corridor, shall be sited and designed to prevent impacts which would significantly degrade riparian habitats, and shall be compatible with the continuance of such habitats.*

In addition, Section 30240 of the Coastal Act provides:

- (a) *Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*
- (b) *Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those area, and shall be compatible with the continuance of those habitat and recreation areas.*

The retaining wall is not consistent with the Ventura County LCP and Section 30240 of the Coastal Act because: (a) it has altered the creek bank and is likely cause accelerated erosion into the creek channel, (b) it displaces riparian habitat and prevents riparian vegetation from growing there, and (c) adverse impacts to water quality will occur if creosote from the railroad ties leaches into the creek. This has the potential to harm marine organisms. Thus, the retaining wall will have impacts that will significantly degrade the riparian habitat and is not compatible with continuance of the riparian habitat.

Chain link fence with view-blocking shade fabric

Section D, Policy 7 of the South Coast Area Plan Environmentally Sensitive Habitats provides:

Scenic and Visual Qualities:

7. *New development shall be sited and designed to protect public views to and from the shoreline and public recreational areas. Where feasible, development on sloped terrain shall be set below road grade.*

Coastal Act Section 30251 provides:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas...

The installation of a chain link fence with visually impermeable shade fabric along Pacific Coast Highway does not meet the scenic and visual quality requirements of the Ventura County LCP or Section 30251 of the Coastal Act because it blocks public views of the ocean from Pacific Coast Highway.

Landscaping

Finally, the landscaping on both sides of the fence near the road blocks public views to the shoreline and the ocean from the highway, which is not consistent with the requirements for approval in the LCP and Section 30251 of the Coastal Act, as discussed above. Some of the plants are non-native and invasive and have the capacity to degrade the ESHA as they mature.

C. Archaeology

The southeastern portion of the property was identified as an important archaeological site in 1952 and was called the Sand Dune Site. After the discovery of a prehistoric Native American shell midden and artifacts in 1966, this portion of the site was designated a State Archaeological Site VEN-86. In 1971, researchers excavated a prehistoric Native American burial and a large mortar at the site. Archaeological excavation of portions of the site indicates the site was occupied for over 3000 years and its occupation overlaps the later occupation at VEN-1, on the east side of Little Sycamore Canyon Creek, which is owned by the California Department of Parks and Recreation. (EXHIBIT E) The potential for additional discoveries of Native American burials and artifacts at the site is indicated. In the event that Native American burials or artifacts are excavated in the process of removing the unpermitted development and restoring the site, they must be handled in accordance with relevant law, including California Public Resources Code Section 5097.9.

D. Background and Administrative Resolution Attempts

On March 11, 2003, Commission staff discovered unpermitted development consisting of: (1) ongoing construction of a seawall/planter at the toe of a coastal bluff, (2) a 6-foot high staggered double retaining wall on the upper section of the bank of Little Sycamore Canyon Creek, (3) a chain link fence with visually impermeable shade fabric along Pacific Coast Highway, and (4) landscaping, including the use of some non-native and invasive species on both sides of the fence that block public views of the ocean from the highway. The seawall/planter

was constructed of 8-foot railroad ties in a concrete footing approximately 3 feet below beach grade, with sand bermed at the seaward base of the wall.

Commission staff spoke with Mr. Lynch, who identified himself as the owner of the property. Mr. Lynch informed Commission staff that he was constructing the wall to protect his property from erosion. Commission staff explained to Mr. Lynch that Coastal Act Section 30600(a) requires persons performing development in the coastal zone to obtain a CDP and that seawalls are only permitted when required to protect existing structures in danger from erosion. Commission staff advised Mr. Lynch he was violating the Coastal Act, that he must halt construction immediately, and that he needed to obtain a CDP to conduct any further work.

Mr. Lynch asserted that Ventura County Building inspector Steve MacAtee had visited the site and advised him the development did not require a CDP. Commission staff informed Mr. Lynch the Commission had jurisdiction over the beach area and that the development required a CDP. Commission staff instructed Mr. Lynch to halt any further work on the seawall/planter, and to remove any loose timber and construction debris from the creek. Commission staff also informed Mr. Lynch that any further construction activity would constitute knowing and intentional violation of the Coastal Act. Mr. Lynch indicated he understood these instructions and agreed to follow Commission staff's direction.

During a site visit on March 12, 2003, Commission staff observed that construction of the unpermitted seawall was continuing with the use of a backhoe on the beach, which was dumping imported soil to backfill behind the seawall/planter. Commission staff observed two wood pallets on the property, each stacked with approximately 50 bags of dry concrete.

On March 13, 2003, Commission staff hand-delivered a NOI to issue an EDCDO (EXHIBIT C) to Respondents at their residence at 42500 Pacific Coast Highway in accordance with the provisions of Coastal Act Section 30809(b). The NOI specifically required them to cease all unpermitted work at the site. It stated "the Executive Director intends to issue an EDCDO against you unless you respond to this letter in a satisfactory manner." The NOI stated "a satisfactory response should include an assurance that no further development will be undertaken at the site unless specifically authorized by a permit granted by the Commission." Respondents did not agree to halt construction.

On March 14, 2003, Mr. Lynch contacted Commission staff by telephone in response to the directions in the NOI. He also faxed a letter dated March 16, 2003 and a copy of Ventura County Document SBD. B-12 (dated October 1996). (EXHIBIT H) This document is a reference document provided by the County that generally indicates that retaining walls less than 36 inches in height may be exempt from County requirements for building permits. Document SBD. B-12,

however, is not an exemption or authorization by the County for any development on Respondents' property. In his letter, Mr. Lynch asserted he was constructing a "36-inch high planter" and that it is exempt from the requirement for a CDP. He also restated his understanding that the project is in the jurisdiction of Ventura County LCP not the Commission. Mr. Lynch did not provide a verbal or written assurance that he would halt construction activity.

On March 17, 2003, Commission staff observed a large dump truck depositing several cubic yards of soil and a backhoe berming sand at the toe of the seawall/planter and backfilling the space behind the wall. Commission staff also observed recent evidence of grading in the creek channel. Commission staff again advised Mr. Lynch that he was violating the Coastal Act and directed him to halt construction immediately. Mr. Lynch declined to stop, asserting that the work was landscaping and that Mr. MacAtee had told him the development was in the jurisdiction of the Ventura County LCP and the Commission had no authority to regulate the activity.

Also on March 17, 2003, Nancy Francis, Residential Permit Supervisor at the Ventura County Planning Division, confirmed to Commission staff that a CDP is required for any development on the beach and that the 36-inch permit exemption does not apply to development activities on the beach. The County also agreed that the unpermitted seawall/planter is in the Commission's retained jurisdiction. Commission staff conveyed this information to Mr. Lynch and again advised him to immediately halt construction activity.

On March 18, the Executive Director concluded it was necessary to issue the EDCDO because Mr. Lynch had failed to provide adequate assurances he would stop work, as required by the NOI.

On March 19, 2003, the Executive Director issued EDCDO No. ED-03-CD-01 to Respondents, as owners of the property that contains the unpermitted development. The EDCDO required Respondents to "cease and desist from violating the Coastal Act by undertaking development without a CDP, including the construction of a timber retaining wall/seawall and concrete footing on the beach." The CDO was hand delivered by Commission staff. No construction activity was observed.

On April 14, 2003, Commission staff sent a letter to Nancy Francis at the Ventura County Planning Division requesting coordination with the County in enforcing the unpermitted development on Respondents' property that lies within the County certified LCP jurisdiction. (EXHIBIT F) In a response to Commission staff's letter dated April 16, 2003, Todd Collart of the Ventura County Planning Division confirmed the existence of the violations and indicated the County lacked the capacity to enforce the LCP violations due to insufficient staff. (EXHIBIT G) The letter also states that should Respondents attempt to remedy the violations, they should contact the Planning Division.

On April 17, 2003, the Executive Director sent Respondents a NOI to commence this CDO proceeding (EXHIBIT I) to prohibit any further unpermitted development and remedy the violation. The NOI stated, "In addition to requiring you to cease and desist from conducting any further development on your property without a CDP in violation of the Coastal Act, if issued, the CDO would require the immediate removal of the unpermitted development and restoration of the property to its pre-violation condition." The letter stated that Commission staff would schedule a hearing on the issuance of the CDO at the June 2003 Commission meeting in Long Beach.

On May 5, 2003, in response to an email inquiry from Mr. Lynch dated April 17, 2003, Commission staff sent a letter to Mr. Lynch outlining the jurisdiction issues regarding the unpermitted development on his property and explaining his options to resolve the Coastal Act violations.

On May 21, 2003, Commission staff received Respondents' Statement of Defense. (EXHIBIT J)

On May 22, 2003 Commission staff participated in a conference call with Mr. Lynch and his attorney John Fletcher. Various proposals to resolve this matter were discussed. On May 23, 2003, Commission staff again discussed settlement options with Mr. Fletcher. Commission staff was unsuccessful in persuading Respondents to agree to resolve this matter through a consent order because Mr. Lynch did not agree to remove all of the unpermitted development and refused to discuss payment of a penalty or admit any wrong doing. In exchange for the Commission staff's agreement to postpone Commission action on a unilateral CDO scheduled for the June Commission meeting, Mr. Lynch and Mr. Fletcher agreed, to consider possible mitigation projects in lieu of a penalty and come back to Commission staff with a new settlement offer. Commission staff never heard from Respondents or their attorney and calls to Respondents' attorney went unreturned.

On June 9, 2003, Executive Director Peter Douglas and Chief of Enforcement Lisa Haage received letters from Mr. Lynch by electronic mail. (EXHIBIT K) In his letter to Mr. Douglas, Mr. Lynch provided background information about the case and proposed to arrange for the removal of only the seawall/planter in exchange for Commission staff's agreement to halt this CDO proceeding. Mr. Lynch did not agree to remove the other items of unpermitted development on his property or agree to pay a penalty. (Mr. Lynch had made basically the same settlement offer to Commission staff during the conference call on May 22, 2003.

Commission staff again agendized a public hearing and Commission action on a unilateral CDO at the July Commission meeting. On July 10, 2003 (the evening

before the day of the scheduled hearing), Commission staff and Mr. Lynch reached a tentative agreement on the terms of a Consent Order. Mr. Lynch and Mr. Fletcher then indicated that they did not represent Ms. Harrington and were unable to finalize the agreement because they did not have her consent. They agreed, however, that they would recommend that she approve the terms of the Consent Order. Commission staff agreed to postpone Commission action on the CDO again with the expectation that the Consent Order would be approved. Commission scheduled a public hearing and Commission action on the negotiated Consent Order at the August meeting.

On July 24, 2003, Mr. Fletcher advised Commission staff that Ms. Harrington approved the terms of the Consent Order, however, Respondents could not be located to sign the Consent Order, as is required prior to Commission action on a Consent Order. Commission staff obtained the signature of Mr. Fletcher on the Consent Order and gave Respondents a deadline of close of business on July 28, 2003 to sign the Consent Order they had agreed to.

On July 28, 2003, Respondents declined to sign the Consent Order that they previously agreed to and insisted on the inclusion in the Consent Order of language that was unacceptable to Commission staff and terms that were inconsistent with the policies of the Coastal Act.

On July 29, 2003, Commission staff sent a letter to Mr. Fletcher and Respondents (EXHIBIT L) indicating that Commission staff would not recommend yet more changes to the Consent Order that would be inconsistent with Coastal Act policies and the statutory requirements of Section 30810 of the Coastal Act and its implementing regulations. Commission staff also informed Mr. Fletcher and Respondents that Commission consideration of the matter was again postponed to the September 2003 Commission meeting.

On August 4, 2003, Commission staff received an email from Mr. Fletcher stating that Respondents had dismissed him as their legal counsel. On August 12, 2003, Commission staff was contacted by attorney Stanley Lamport who indicated that he had been retained by Respondents to represent them in this matter. Mr. Lamport indicated that Respondents were again interested in resolving the Coastal Act violations on their property through a Consent Order. Commission staff indicated that they would entertain a new settlement offer, but emphasized that, in light of the additional resources expended to reach a settlement, the new offer would have to include payment of a higher penalty than Commission staff was previously willing to accept.

Commission staff again scheduled During the week of August 18, 2003, Commission staff and Mr. Lamport held numerous discussions to try to reach agreement on language in the Consent Order that would be acceptable to both Commission staff and Respondents. On August 21, 2003 (the deadline for reproducing and mailing the staff reports), Mr. Lamport sent a letter to

Commission staff stating that not only were Respondents unwilling to pay a higher penalty, but they were now unwilling to pay any penalty. (EXHIBIT M)

Commission staff agendized Commission action on a CDO at the September 2003 meeting. On September 9, 2003, Commission staff received from Mr. Lamport a letter requesting a continuance of the public hearing and Commission consideration of the proposed CDO because Mr. Lynch was too ill to travel to the meeting. Because Staff understood that Mr. Lynch desired to address the Commission, they consented to the continuance.

E. Allegations

- (1) Respondents are owners of the vacant lot adjacent to 42500 Pacific Coast Highway containing the unpermitted development that is basis of the Coastal Act violations that are the subject of this CDO proceeding. (Not contested)
- (2) Respondents did not obtain a CDP approved by the Commission or Ventura County to authorize the development on their property. (Not contested)
- (3) The development conducted by Respondents on their property was unauthorized. (Contested)
- (4) After initially halting construction activity on March 11, 2003 at the direction of Commission staff, Respondents recommenced construction activity without a CDP on March 12, 2003. (Not contested)
- (5) Development, as that term is defined in the Coastal Act, continued at the site for four days after Commission staff informed Respondents of the Coastal Act permit requirements on March 11, 2003. (Not contested)
- (6) Respondents knowingly and intentionally violated the Coastal Act by conducting development without a CDP. (Contested)
- (7) Respondents installed a chain link fence with shade fabric that blocks public views of the ocean from Pacific Coast Highway. (Not contested)
- (8) Respondents landscaped on their vacant lot with invasive plants not native to southern California. (Contested)

F. Statement of Defense

- (1) Respondents assert that all development that is the subject of this enforcement action was given approval by other government agencies that claimed to have jurisdiction over the development.

- (a) **Construction of “36-inch high planter”:** Respondents assert the Ventura County Building and Safety Division informed them the development was exempt from permit requirements and gave prior approval to the project during on-site inspections. Respondents state the County building inspector specifically informed Respondents the County had jurisdiction over the project and the Coastal Commission did not have jurisdiction. Respondents say they consulted with state and federal wildlife agencies and the U.S. Army Corps of Engineers before commencing work and they had “no issues” and “no problems” with the project.

Commission response:

Respondents have not provided Commission staff with any evidence that any permit, exemption or any other form of authorization was ever issued by Ventura County or any other government agency for the unpermitted development. Respondents provided Commission staff with Form SBD. B-12 (EXHIBIT H), which is simply a general reference document that does not constitute an authorization for development. While the Commission does not dispute Respondents’ claim they received incorrect advice from Ventura County with regard to the need to obtain a CDP for the unpermitted development, the Commission rejects Respondents’ assertion that they had a right to rely on such advice. Respondents have not provided Commission staff with proof of potential contacts with state and federal wildlife agencies and the U.S. Army Corps of Engineers.

Section 30600(a) of the Coastal Act states, “in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person... wishing to perform or undertake any development in the coastal zone... shall obtain a coastal development permit.” Under California law, one public agency cannot impair the legal jurisdiction of another public agency by giving erroneous advice. (*California Tahoe Regional Planning Agency v. Day and Night Electric, Inc.* (1985) 163 Cal.App.3d 898.) Moreover, on several occasions Commission staff informed Respondents of the Commission’s authority and provided the statutory basis to Respondents both verbally and in writing. Thus, regardless of whether other government agencies advised Respondents they did not require a CDP, Respondents were responsible for complying with the Coastal Act permit requirements and were informed of such on numerous occasions.

- (b) **Landscaping, including some non-native and invasive species that block public views of the ocean from the highway:** Respondents admit to landscaping with plants native to southern California along the side of Pacific Coast Highway. Respondents

contend that work was inspected and approved by California Department of Transportation. Respondents further assert that no non-native, invasive plant species were introduced to the area.

Commission response:

Landscaping on a vacant lot constitutes development and requires a CDP. In addition, some of the species planted by Respondents are non-native and invasive species, including Myaporum trees. The unpermitted landscaping blocks public views of the ocean from the highway, which is not consistent with Policy 7 Section D of the Ventura County LCP or Coastal Act Section 30251. The Commission is willing to allow Respondents to retain the native southern California plants they have planted on their on their property as long as they will not in the future block public views of the ocean from the highway.

- (c) ***Chain link fence and visually impermeable shade fabric:*** Respondents state the fence is within the right-of-way of Pacific Coast Highway and that it predates the Coastal Act. Respondents admit to the addition of the shade fabric but assert they were given prior approval by the California Department of Transportation, which specifically informed them it had jurisdiction. Respondents note there are many such shade fabrics on fences in the vicinity of the property including state parks and beaches. Respondents further note that almost 200 feet of the same lot provides the public with unobstructed views of the ocean.

Commission Response:

Respondents have neither provided Commission staff with evidence the fence predates the Coastal Act nor filed a claim of vested rights for consideration by the Commission. (See 14 CCR Sections 13200-13207) Respondents have provided Commission staff with photographs of chain link fences with shade fabric and walls along Pacific Coast Highway in the vicinity of their property to show that it is a common feature in the area. Commission staff is investigating the fences and walls to determine whether they are permitted, or alternatively whether they are violations of the Ventura County LCP or the Coastal Act. Regardless of the results of this investigation, the Commission has the statutory right to take action in response to the Coastal Act violations on Respondents' property pursuant to Section 30810 of the Coastal Act.

Although the only fact at issue in the issuance of this CDO is whether the development was authorized by a valid CDP, it is also noted for the record that Policy 7 of Section D of the LCP provides, "...development shall be sited and designed to protect views to and from the shoreline..." In this case, the fence and shade fabric blocks public views of the shoreline and ocean from Pacific Coast Highway. The LCP does not recognize maintaining public views across a portion of Respondents' property as a justification for failing to protect public views over another section of the

property. Thus, Respondents' installation of the chain link fence with shade fabric violates the LCP policy cited above as well as Coastal Act Section 30251.

- (2) Respondents assert that based on findings adopted by Ventura County in connection with its previous approval of CDP Nos. PD-1290 and PD-1738, the County determined that the subject property is not located in or near an ESHA. Respondents presented copies of the adopted findings to support this assertion.

Commission Response:

Although the only fact at issue is whether or not Respondents had a valid CDP authorizing the development (which they did not), it is also noted for the record that Section C of the South Coast Environmentally Sensitive Habitats section of the Ventura County LCP defines creek corridors, including Little Sycamore Canyon Creek, as ESHA. Policy 2 of Section C provides, "All projects on land either in a stream or creek corridor or within 100 feet of such corridor, shall be sited and designed to prevent impacts which would significantly degrade riparian habitats, and shall be compatible with the continuance of such habitats." Section 30240 of the Coastal Act provides that ESHA "shall be protected against any disruption of habitat values," and that development adjacent to ESHA "shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat areas..." Virtually all of the unpermitted development lies within 100 feet of the corridor of Little Sycamore Canyon Creek. The unpermitted retaining wall on the upper section of the creek bank will significantly degrade the riparian habitat, including the water quality of the Creek and displacement of riparian vegetation. Thus, the retaining wall violates the LCP and the Coastal Act.

G. CEQA

The Commission finds that issuing an order to cease and desist from maintaining unpermitted development in violation of the Coastal Act and to remove of such development is consistent with the requirements of the California Environmental Quality Act (CEQA) of 1970 and will have no significant adverse effects on the environment, within the meaning of CEQA. The proposed CDO is exempt from the requirements for the preparation of an environmental impact report based upon Sections 15060(c)(2), and (3), 15061(b)(2), 15307, 15308 and 15321 of CEQA Guidelines.

Exhibits

- A. Photographs of unpermitted development in Commission jurisdiction.
- B. Photographs of unpermitted development in Ventura County LCP jurisdiction.
- C. Notice of Intent for Executive Director Cease and Desist Order (EDCDO) No. ED-03-CD-01 dated March 14, 2003.
- D. EDCDO No. ED-03-CD-01 issued March 19, 2003.
- E. Archaeological site records, diagrams, maps and photographs regarding Cultural Resource Site VEN-86, provided by the South Central Coastal Information Center of the California Historical Resources Information System.
- F. Correspondence from Tom Sinclair to Nancy Francis dated April 14, 2003.
- G. Correspondence from Todd Collart to Peter Douglas dated April 16, 2003.
- H. Ventura County Division of Building Safety Form SBD. B-12 (dated October 1996).
- I. Notice of Intent for Cease and Desist Order No. CCC-03-CD-07 dated April 17, 2003.
- J. Respondents' Statement of Defense submitted May 21, 2003.
- K. Correspondence from William F. Lynch to Peter M. Douglas and Lisa Haage dated June 9, 2003 and delivered via electronic mail.
- L. Correspondence from Chris Darnell to John Fletcher dated July 29, 2003.
- M. Correspondence from Stanley Lamport to Lisa Haage and Christopher Darnell dated August 20, 2003.

COMMISSION CEASE AND DESIST ORDER NO. CCC-03-CD-07

1.0 TERMS AND CONDITIONS

Pursuant to its authority under Public Resources Code Section 30810, the California Coastal Commission hereby orders and authorizes William Lynch and Elizabeth Harrington, as owners of the property described in Section 2.0 of this Order (hereinafter referred to as "Subject Property"), their agents and employees and any persons acting in concert with the foregoing (hereinafter referred to as "Respondents") to:

- 1.1 Cease and desist from maintaining unpermitted development on the Subject Property in violation of the Coastal Act. For the purposes of this Order, "development" is defined in Section 30106 of the Coastal Act.
- 1.2 Refrain from conducting any future development on the Subject Property not authorized by a coastal development permit.
- 1.3 Remove the unpermitted development described in Section 4.0 of this Order and restore the site to its pre-violation condition in accordance with the following requirements:
 - (a) Within 30 days of the Commission's issuance of this Order, Respondents shall submit for the Executive Director's approval a plan, prepared by a certified restoration consultant, for the complete removal of said unpermitted development and restoration of the site. In addition to describing the process for removal of said unpermitted development, the plan shall provide for:
 - (i) Measures to prevent damage to the existing coastal bluff and stabilization of the banks of Little Sycamore Canyon Creek during the removal of the unpermitted development;
 - (ii) Protection of the water quality and natural flow of Little Sycamore Canyon Creek through the use of sediment fencing;
 - (iii) Protection of existing native California vegetation on the property;
 - (iv) Replacement of any displaced native California vegetation on the bluff and in the creek channel;

- (v) Restorative grading on the beach; and
- (vi) Protection and conservation of any Native American human remains or artifacts that may be excavated in the process of implementing said restoration plan. Discoveries of human remains are required to be reported to the County Coroner. Any Native American human remains or artifacts must be handled in accordance with relevant law, including California Public Resources Code Section 5097.9.

The Plan must be sent to the attention of Southern California Enforcement Supervisor Steve Hudson in the Commission's South Central District office at 89 S. California Street, Suite 300, Ventura, CA 93001-2801. If the Executive Director determines that any modifications or additions to the plan are necessary, he shall notify Respondents, and Respondents shall modify the plan and resubmit the plan with 10 days.

- (b) Within 60 days of the approval of said plan by the Executive Director, Respondents shall complete removal of said unpermitted development and remediation of the Subject Property, in accordance with the approved plan and this Order. No railroad ties or portions of the concrete footing shall be left on the beach or within the banks of Little Sycamore Canyon Creek.
- (c) Within 10 days of completing the removal of said unpermitted development and restoration of the Subject Property in accordance with the approved plan, Respondents shall provide photographic documentation of the completion of the work required under this section. These photographs shall be sent to the attention of Southern California Enforcement Supervisor Steve Hudson in the Commission's South Central District office at the address provided in Subsection (a).

2.0 IDENTIFICATION OF THE SUBJECT PROPERTY

The property that is the subject of this Order is described as an undeveloped lot adjacent to 42500 Pacific Coast Highway in Malibu, Ventura County (APN 0700-80-0305).

3.0 PERSONS SUBJECT TO THIS ORDER

Persons subject to this Order consist of Elizabeth Harrington, the owner of the Subject Property, her husband William Lynch, their agents and employees, and any persons acting in concert with the foregoing.

4.0 DESCRIPTION OF UNPERMITTED DEVELOPMENT

The unpermitted development consists of (a) construction of a 6 foot high railroad tie seawall/planter with a concrete footing, (b) construction of an rail road tie retaining wall on the upper section of the bank of Little Sycamore Canyon Creek, (c) installation of a chain link fence with a visually impermeable shade fabric along Pacific Coast Highway that blocks ocean views from Pacific Coast Highway, and (d) landscaping, including non-native and invasive species that blocks ocean views from Pacific Coast Highway.

5.0 COMMISSION JURISDICTION

A portion of the unpermitted development lies within the Commission's retained jurisdiction and the remainder is in the jurisdiction of the Ventura County Local Coastal Plan (LCP). The Commission requested the County to enforce the unpermitted development in the LCP jurisdiction and the County declined due to a lack of resources. Pursuant to Coastal Act Section 30810(a)(2), the Commission is authorized to issue a cease and desist order to enforce the provisions of an LCP in cases where the local jurisdiction either declines to take action or is unable to take action.

6.0 FINDINGS

This Cease and Desist Order is being issued on the basis of the findings adopted by the Commission on November 6, 2003, as set forth in the attached document entitled Recommended Findings for Cease and Desist Order No. CCC-03-CD-07.

7.0 EFFECTIVE DATE

This Order shall become effective as of the date of issuance by the Commission and shall remain in effect permanently unless and until rescinded by the Commission.

8.0 COMPLIANCE OBLIGATION

Strict compliance with this Order by Respondents is required. If Respondents fail to comply with the requirements of Section 1.0 of this Order, including any deadline contained therein, it will constitute a violation of this Order and may result in the imposition of civil penalties of up to six thousand dollars (\$6,000) per day for each day in which such compliance failure persists. The deadlines

contained in Section 1.3 of this Order may be extended by the Executive Director for a showing of good cause. Any extension requests must be made in writing to the Executive Director and received by the Commission staff at least 10 days prior to the expiration of the deadlines contained herein.

9.0 APPEALS AND STAY RESOLUTION

Pursuant to Public Resources Code Section 30803(b), Respondents against whom this Order is issued may file a petition with the Superior Court for a stay of this Order.

10.0 GOVERNMENT LIABILITY

The State of California shall not be liable for injuries or damages to persons or property resulting from acts or omissions by Respondents in carrying out activities pursuant to this Order, nor shall the State of California be held as a party to any contract entered into by Respondents or their agents in carrying out activities pursuant to this Order.

11.0 SUCCESSORS AND ASSIGNS

This Order shall run with the land, binding all successors in interest, future owners of the property, heirs and assigns of Respondents. Notice shall be provided to all successors, heirs and assigns of any remaining obligations under this Order.

12.0 GOVERNING LAW

This Order shall be interpreted, construed, governed and enforced under and pursuant to the laws of the State of California, which apply in all respects.

13.0 LIMITATION OF AUTHORITY

Except as expressly provided herein, nothing in this Order shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with this Order.

Issued this 6th day of November, 2003.

Peter M. Douglas, Executive Director